BOARD OF APPEALS CASE NO. 5304	*	**BEFORE THE**
APPLICANT: Michael Cullum	*	**ZONING HEARING EXAMINER**
REQUEST: Appeal zoning violation and amend Case No. 4561 to permit vehicles to be parked outside; 1904 Eden Mill Road, Pylesville	*	**OF HARFORD COUNTY**
	*	**Hearing Advertised**
HEARING DATE: January 22, 2003	*	**Aegis: 11/6/02 & 11/13/02** **Record: 11/8/02 & 11/15/02**
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ZONING HEARING EXAMINER'S DECISION

The Applicant, Michael E. Cullum, appeals a zoning violation notice dated October 10, 2002 pursuant to Section 267-7E of the Harford County Code or, in the alternative, the Applicant requests an amendment of Condition #4 as set forth in Board of Appeals Case No. 4561, to permit vehicles used in the business to be parked outside of the building during daylight hours. The Applicant modified his request during the Hearing to allow such outside storage of vehicles not only during daylight hours but 24 hours per day, 7 days per week.

The subject parcel is located at 1904 Eden Mill Road, Pylesville, Maryland 21132 and is more particularly identified on Tax Map 9, Grid 3B, Parcel 223. The parcel consists of 2.19 acres, is presently zoned AG/Agricultural, and is entirely within the Fourth Election District.

History of the Case

Board of Appeals Case No. 4561 was decided on November 30, 1995 wherein the Applicant was granted a special exception use for the storage of commercial vehicles pursuant to Code Section 267-53D(1) and for construction services pursuant to Code Section 267-53H(1). Additionally, the Applicant was granted an area variance pursuant to the provisions of Code Section 267-34B, Table II to construct a storage building within the required side and rear yard setbacks.

There were 4 conditions of approval required by the Hearing Examiner:

1. **The Applicant obtain all necessary permits and inspections.**

2. **The building be used for the purposes described by the Applicant in testimony before the Hearing Examiner. Any change or modification of the use shall be subject to further Board of Appeals review and approval.**

3. **The Applicant maintain the natural screening along the west property line.**

4. **All vehicles, equipment and material related to the business shall be stored inside the building.**

The decision in Board of Appeals Case No. 4561 was not subject to appeal from the Hearing Examiner to the Board of Appeals and, consequently, became final on December 20, 1995.

On October 10, 2002, the Department of Planning and Zoning issued a Notice of Violation citing the Applicant for failing to comply with Condition #4 imposed by the Hearing Examiner as part of the approval granted in Board of Appeals Case No. 4561. Specifically, the Applicant was cited for storage of commercial vehicles outside of the building intended and allowed for such storage purposes. The instant appeal was filed in response to that Notice.

Discussion

The Applicant, Mr. Michael Cullum appeared before the Hearing Examiner. The Applicant indicated that he owns a number of vehicles including a Volkswagen, Buick and Chevy Suburban he claims as personal use vehicles and 2 vans, a pick up and a single-axel work body pickup truck used in the business. Additionally, the Applicant owns a subsidiary in Delaware that uses two additional commercial vehicles. The Applicant indicated that he runs the Delaware operation out of his home in Pylesville but does not store those two vehicles on his property. Since the decision rendered in 1995 in Board of Appeals Case No. 4561, the Applicant admitted that the trucks have never been stored inside the building as required by the conditions of approval imposed in that case. He now wants to store 2 trucks on the property 24 hours per day and 2 vans on an intermittent basis, all of which will be outside of the building. The Applicant admitted that he fabricates sheet metal in the building and also stores material and other equipment in the accessory building making it impossible to store the vehicles inside. Generally speaking, unless the trucks and vans are in use, they will be parked on the parcel, outside of the building at all times.

Further testimony by the Applicant shed additional light on the present use. There are 20 to 40 heats pumps delivered to the parcel each year, and 20 to 30 companies deliver equipment and material to his property on a regular basis.

The Applicant admits that the access is very narrow and he tries to offload material and equipment away from the narrow confines of the panhandle access. Cullum did state that the first 3 years of operation resulted in a great deal of congestion but that, improvements he has made to the driveway have alleviated that condition. He employs five persons; three of those use company owned vehicles to go to and from the Applicant's property and the other two arrive by private vehicles that remained parked on the Applicant's property while they work. UPS deliveries occur nearly every day according to the Applicant. Mr. John Biasucci, a driver for UPS, appeared and testified that he has been delivering packages to the Cullum property for 2 years. The witness indicated that he has had no difficulty entering or leaving the Cullum parcel during that time period.

Upon questioning by the Hearing Examiner, the Applicant stated that the vehicles intended to be stored outside cannot be fully screened from the view of adjacent property owners unless the building is used for that purpose. Additionally, the Applicant could not remember if he failed to testify regarding the actual use of the building for fabrication and equipment storage in the 1995 hearing. He did admit that he never intended to nor did he ever store the vehicles inside the building.

The Department of Planning and Zoning recommended conditional approval of the Applicant's request. The conditions included parking being confined to daylight hours only and that clear access be provided for delivery trucks and trucks not be allowed to park in the circle. Upon further questioning, Ms. Nancy Lipski, representative of the Department of Planning and Zoning, admitted that testimony which she heard during the hearing by the Applicant may require further investigation.

Mrs. Darlene Norcross appeared and indicated that she lives at 1910 Eden Mill Road. Her property consists of 28 acres and she shares a common drive with the Applicant. The witness testified that the driveway is congested "all day long" and that delivery trucks often use her driveway. The post at the end of her driveway has been damaged by delivery trucks.

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The witness described a disturbing incident in which she claims the Applicant began screaming at her to move her car and allow a delivery truck to access her driveway. Mrs. Norcross stated that two trucks at a minimum use her driveway for access on a weekly basis. She can see a variety of trucks, cars and vans parked on the Applicant's property all the time including an SUV, red GL truck, box trucks several vans, a large white van-like truck, a VW and several cars. Mrs. Norcross claims trucks are in and out of the Cullum property all day long. Upon cross examination, Mrs. Norcross stated that she wants the original conditions of approval to be enforced. She does not want the Applicant to lose his ability to earn a living and operate from his property but she does expect the congestion, traffic and outside storage to stop.

In rebuttal testified Mr. Alton Hilken who lives at 1906 Eden Mill Road. Mr. Hilken indicated that he has no objection to the Cullum use nor has he experienced congestion or driveway blockage as a result of the Cullum operation.

Conclusion

The Applicant, Michael E. Cullum, appeals a zoning violation notice dated 1010-02 pursuant to Section 267-7E of the Harford County Code or, in the alternative, the Applicant requests an amendment of Condition #4 as set forth in Board of Appeals Case No. 4561, to permit vehicles used in the business to be parked outside of the building during daylight hours.

The original request in Case No. 4561 involved the following statutes that provide as follows:

Section 267-53(D)(1) allows the storage of commercial vehicles and states:

"Motor vehicle and related services.

(1) Commercial vehicle and equipment storage and farm vehicle and equipment sales and service. These uses may be granted in the AG District, and commercial vehicle and equipment storage may be granted in the VB District, provided that:

(a) The vehicles and equipment are stored entirely within an enclosed building or are fully screened from view of adjacent residential lots and public roads.

(b) The sales and service of construction and industrial equipment may be permitted as an accessory use incidental to the sales and service of farm vehicles and equipment.

(c) A minimum parcel area of two (2) acres shall be provided."

Section 267-53H(1) provides:

"Construction services and suppliers. These uses may be granted in the AG and VB Districts, provided that a buffer yard ten (10) feet wide shall be provided around all outside storage and parking areas when adjacent to a residential lot or visible from a public road."

In turning first to the question of whether the Applicant's use constitutes a zoning violation as alleged by the Department of Planning and Zoning, the Hearing Examiner finds that the Applicant has violated the Conditions of approval imposed by Board of Appeals Case No. 4561 in that the Applicant has consistently ignored Condition #4 by parking and storing commercial vehicles outside of the accessory building. Moreover, the Hearing Examiner notes that the findings made in Case No. 4561, indicate that the requests for variances related to the building were based not only on storage for personal and business use items but was fully intended to be used for storage of two pick up trucks. The findings of fact by the Hearing Examiner in Case 4561 indicate that, at the time of the Hearing, the Applicant owned one (1) 3/4 ton pick-up truck and was requesting approval to store two of this type of vehicle (Decision: Case No. 4561, page 1). The Hearing Examiner found that the trucks were intended to be stored inside the building that was subject to a request for variance as to location within the setback requirements. Moreover, the Hearing Examiner found that there were no employees at the time Case No. 4561 was heard and the Applicant hoped the business would grow to employ two additional people beside the Applicant himself. The business now has 5 employees. Although not specifically before the Hearing Examiner, the Examiner notes that it appears from the testimony of the Applicant and the witnesses that appeared in this case that substantial expansion of the original business has taken place without the further review and approval required by Condition #2 imposed by Case No. 4561 which required that, "Any change or modification of the use shall be subject to further Board of Appeals review and approval."

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In the opinion of the Hearing Examiner, any request for modification of the conditions of approval of a special exception must necessarily follow the same requirements of approval as the original request.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) ("Schultz").

> **"While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) ("Turner").**
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> **The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." See Schultz at 432 A. 2d 1327.**

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) ("Anderson").

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The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) ("Sharp").

In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) ("AT&T").

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) ("Mossburg") the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

> **"The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or "above and beyond", then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere." (emphasis supplied)**

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

The Hearing Examiner finds that there are conditions existing at this location that serve to rebut the presumption of compatibility. First, the Applicant cannot, by his own admission, provide the necessary screening pursuant to Code Section 267-53(D)(1)(a). In Case No. 4561 the Applicant complied with this provision by indicating he was going to construct a building capable of housing his commercial vehicles. Now, however, having gained approval for the special exception use and ignored the conditions of approval required thereunder, the Applicant asks that the Board ignore the screening requirements of the Code as well.

Secondly, it appears that the actual use has changed substantially since the 1995 request. The building is being used for purposes not intended nor approved by Case No. 4561. There are 5 employees, not the two that the Applicant requested. There are at least 5, and perhaps as many as 8, commercial vehicles used in the business and 5 personal vehicles (3 owned by the Applicant and two are driven by employees) compared to the 2 pickup trucks indicated by the Applicant during testimony taken in 1995. All of this increased use and activity results from growth in the Applicant's business over the years. While the Hearing Examiner commends the Applicant for such successful business operations over the last 8 years, it appears that the business has outgrown its present location, with little resemblance to the "one man, 2 trucks, fully-enclosed operation" that was approved by the Hearing Examiner in 1995. Deliveries have increased, traffic in an out of a common-use driveway, which is very narrow and the only means of ingress and egress to the other panhandle lots, has increased, congestion has occurred, improper use of a neighbor's driveway occurs, vehicles don't fit in the building anymore. Tempers have flared on occasions resulting in deteriorating relations among neighboring property owners. All of these factors lead the Hearing Examiner to conclude that the use as currently described does have adverse impacts above and beyond those inherently associated with such a use regardless of its location within the Agricultural zone.

For all of the foregoing reasons, the Hearing Examiner recommends denial of the request to modify Condition #4 imposed in Case No. 4561. Further, the Hearing Examiner agrees with the Department of Planning and Zoning that the Applicant has been in continuous violation of the conditions of approval granted in 1995, pursuant to Board of Appeals Case No. 4561.

Date MARCH 6, 2003

William F. Casey
Zoning Hearing Examiner